EAT, DRINK, AND MARRY: WHY *BAKER V. NELSON* SHOULD HAVE NO IMPACT ON SAME-SEX MARRIAGE LITIGATION

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Due to a now-repealed mandatory jurisdiction statute, in 1972 the Supreme Court was forced to decide the issue of whether there was a constitutional right to same-sex marriage. Their opinion, as stated in the case Baker v. Nelson*, was: "The appeal is dismissed for want of a substantial federal question." That sentence literally comprises the entirety of the summary opinion, and that sentence has obstructed progress in same-sex marriage litigation for decades, including in the last few years. This Note argues that* Baker v. Nelson *should carry zero precedential weight in 2014. Intervening doctrinal developments should have rendered the case overruled, particularly* Zablocki v. Redhail*, which conclusively stated a fundamental right to marry under the Due Process Clause. Furthermore, there are significant differences between the factual circumstances of* Baker *and those of modern cases, particularly the fact that* Baker *involved a clerk's administration of a vague statute as opposed to statutes or constitutional provisions that are facially discriminatory. Contemporary same-sex marriage cases should be decided on their merits and not at all influenced by a one-line summary disposition from a completely different era of the marriage equality movement.*

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INTRODUCTION

Ada Conde Vidal has been with her partner Ivonne Álvarez Velez for nearly fourteen years.[1] They share a life and raise a daughter together, but because they live in the commonwealth of Puerto Rico, they cannot legally marry.[2] Conde Vidal stepped squarely into the spotlight in 2014 when she became the lead named plaintiff in a lawsuit against Puerto Rican Governor Alejandro Garcìa Padilla challenging the commonwealth's statute prohibiting same-sex marriage.[3] Subsequently, the Puerto Rico District Court ruled against Conde Vidal, holding that an earlier Supreme Court case from 1972, *Baker v. Nelson*, controlled.[4] Although the Supreme Court's decision in *United States v. Windsor*[5] might suggest that the fight for marriage equality is mostly won, the holding in that case fails to address the merits of cases like *Conde-Vidal* that are based on state, not federal, laws.

Baker v. Nelson, which dismissed an appeal to grant two Minnesota men a marriage license, is a one-sentence opinion: "Appeal . . . dismissed for want of substantial federal question."[6] *Baker* is an example of a summary disposition, a one-line opinion that either dismisses or affirms a lower court's decision without significant briefing, oral argument, discussion, or analysis.[7] Thus, the leading Supreme

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[1] Michael K. Lavers, *Lesbian Couple Files Marriage Lawsuit in Puerto Rico*, WASH. BLADE, Mar. 26, 2014, http://www.washingtonblade.com/2014/03/26/lesbian-couple-files-marriage-lawsuit-puerto-rico.

[2] *Id.*

[3] Conde-Vidal v. Garcia-Padilla, No. 14-1253 (D.P.R. Oct. 21, 2014), *available at* https://www.scribd.com/doc/243888222/3-14-cv-01253-57-Puerto-Rico-Decision.

[4] *Id.* at 19.

[5] 133 S. Ct. 2675 (2013).

[6] Baker v. Nelson, 409 U.S. 810, 810 (1972).

[7] *See* Alex Hemmer, *Courts as Managers:* American Tradition Partnership v. Bullock *and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 212–13 (2013) ("[S]ummary opinions—although *capable* of making law—are poorly suited to the task, because they are not the products of merits briefing and oral argument.").

Court case pertaining to state laws and marriage equality is a summary opinion,[8] and due to this status, *Baker*'s precedential weight for lower courts remains unclear.[9] In the wake of *Windsor*, the fight for marriage equality has moved to the states, where there is mass confusion about whether *Baker v. Nelson* applies.

Baker v. Nelson arose from an appeal from a Minnesota Supreme Court case holding that two men did not have a federal constitutional right to marry.[10] The men had applied for a marriage license, but Gerald R. Nelson, the county clerk, told them that he could not issue a marriage license to two individuals of the same sex.[11] This occurred even though the Minnesota state marriage statute neither directly commented on the gender of individuals seeking to marry nor explicitly banned same-sex marriage.[12] The petitioners raised constitutional challenges under the First, Eighth, Ninth, and Fourteenth Amendments, and the Minnesota Supreme Court denied them all.[13] The appeal reached the Supreme Court because of laws then in force conferring mandatory jurisdiction on the Court over such cases.[14] With one sentence, the Supreme Court hindered progress toward marriage equality for decades.[15]

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[8] There is a good argument that summary disposition was not at all appropriate for *Baker v. Nelson*. The notion that two people of the same sex could marry was an issue of first impression for the Court when *Baker* presented itself in the early seventies. *See* Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. Ct. App. 1973) (commenting that only two other states had considered—and both had rejected—marriage rights for same-sex couples by 1973, with *Baker* being the only one to be seen by the Supreme Court). The Court, however, stated that summary dispositions are only appropriate where a court applies well-settled law, particularly in cases in which lower courts seem to have misunderstood—or simply ignored—their past precedent. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) ("Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."). *Baker*'s summary dismissal perhaps suggested a general reluctance to address the novel, controversial issue of same-sex marriage, especially in the wake of *Loving v. Virginia*, which invalidated antimiscegenation laws on Equal Protection Clause grounds and also discussed marriage as a basic human right. 388 U.S. 1, 12 (1967).

[9] For an explanation of the confusion caused in lower courts by summary opinions in general, see *infra* Part I.C. For an explanation of the confusion in lower courts caused by *Baker* specifically, see *infra* Part II.A.

[10] Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971).

[11] *Id.* at 185.

[12] *Id.*

[13] *Id.* at 187.

[14] *See infra* note 25 and accompanying text (explaining that the Supreme Court was required to review decisions by state supreme courts that upheld state action against a federal constitutional challenge).

[15] The movement failed to gain traction until almost twenty years later, perhaps in part because the Supreme Court shut down Baker's challenge so dismissively. For examples of *Baker* being used to preclude a marriage equality challenge, see *infra* Part II.A.3.

It may seem absurd that an opinion containing so little analysis can still foreclose cases forty years later. Although 2014 was a banner year for gay marriage rights, the significance of *Baker* is still viewed by many as an open issue. In a recent oral argument, a Sixth Circuit judge posed the question, "Even when you see one line of cases crumbling, you the lower courts aren't allowed to infer, and anticipatorily overrule, this other line of cases. So just, I guess really as a matter of hierarchy, aren't we stuck with *Baker*?"[16] And in *Conde-Vidal*, the Puerto Rico District Court discussed developments in the law in the many years since *Baker*,[17] but they neglected the one that is most crucial.

In this Note, I argue that *Baker v. Nelson* should have no relevance whatsoever to modern-day marriage equality litigation. This is not, as most courts that hold *Baker* irrelevant have suggested,[18] because intervening Supreme Court cases have protected gays and lesbians, but because *Baker*'s precedential value is undermined both by the development of a robust protection of the right to marry in the years since *Baker* and by the differences between *Baker*'s factual circumstances and those of today's marriage equality cases.

In Part I, I review and synthesize the doctrine for evaluating the precedential weight of summary opinions. I start by outlining the background of summary opinions as a tool of administrative convenience for the Court. Next, I briefly review the doctrine of stare decisis as the default way of understanding Court precedent. Finally, from a variety of sources, I synthesize a two-part test for evaluating the precedential weight of summary opinions.[19]

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[16] Oral Argument at 29:33, DeBoer v. Snyder, No. 14-1341 (6th Cir. Argued Aug. 6, 2014), *available at* http://player.piksel.com/p/w70z36r9.

[17] *See* Conde-Vidal v. Garcia-Padilla, No. 14-1253, slip op. at 12–19 (D.P.R. Oct. 21, 2014), *available at* https://www.scribd.com/doc/243888222/3-14-cv-01253-57-Puerto-Rico-Decision. Other courts have addressed the question of *Baker*'s applicability differently. *See infra* Part II.A.1–2 (discussing decisions holding that *Baker* should carry little weight today due to intervening doctrinal developments).

[18] *See infra* Part II.A.1–2 (discussing lower court decisions addressing *Baker*).

[19] Recognizing that many summary dispositions have uncertain precedential impact, the Supreme Court has commented on the stare decisis value of such opinions. The Court has said that such opinions carry little precedential significance; their value is essentially restricted to a case where, first, the set of facts and the issues in the jurisdictional statement are nearly identical, and second, there have been no intervening doctrinal developments. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) ("[Summary opinions] prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."); Port Auth. Bondholders Protective Comm. v. Port of N. Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967) ("[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.").

In Part II, applying the first prong of this test, I demonstrate that doctrinal developments in same-sex marriage jurisprudence since *Baker* undermine the case's precedential weight. I contend that lower courts seeking to evade *Baker* by invoking *Lawrence v. Texas*[20] and *Romer v. Evans*[21] miss the mark. So too do those lower courts seeking to apply *Baker* as definitive precedent. Instead, I argue that the most significant post-*Baker* doctrinal development is *Zablocki v. Redhail*,[22] the first Supreme Court case to definitively find a fundamental constitutional right to marriage.

In Part III, I apply the second prong of the test from Part I to examine whether the specific facts and issues decided in *Baker* can be applied to contemporary same-sex marriage cases. Because *Baker* predated the marriage equality movement, it also predated the marriage inequality movement: Minnesota had no law specifically prohibiting same-sex marriage. Baker could not marry his partner because a court clerk thought that granting a marriage license to two men seemed inadvisable. By contrast, a legislature's decision to ban same-sex marriage by statute reflects a different animus, and it should therefore trigger a different analysis. This suggests that *Baker* is distinguishable from modern cases with respect to the existence of discriminatory laws (contemporary) versus the discriminatory administration of facially neutral laws (*Baker*) and the Court's distinction between discrimination based on sexual orientation (contemporary) versus sex (*Baker*). Therefore, I argue that *Baker*'s factual scenario should not foreclose the development of modern same-sex marriage jurisprudence.

I
Evaluating the Weight of Summary Opinions

As mentioned above, *Baker v. Nelson* was issued as a one-line opinion and decided without full briefing or oral argument, a common practice when the Supreme Court had extensive mandatory jurisdiction. Part I.A will explain that the Court has limited the precedential weight of summary opinions by holding that they applied only to later opinions with near-identical facts and issues presented, and only if there have been no intervening doctrinal developments. In Part I.B, I

[20] *See* 539 U.S. 558, 578 (2003) (holding that a law prohibiting adult consensual homosexual intercourse was unconstitutional under the Due Process Clause of the Fourteenth Amendment).

[21] *See* 517 U.S. 620, 623 (1996) (holding that a Colorado constitutional amendment preventing protected status for homosexuals was unconstitutional under the Fourteenth Amendment).

[22] 434 U.S. 374, 381–82 (1978).

will examine general principles of stare decisis and show that despite the doctrine's goal of creating stability and clarity, summary dispositions often have the opposite effect.

A. The Administrative Convenience of Summary Dispositions

Before 1988, the Supreme Court was required by law to grant appellate review to a significant number of cases. The Court complained to Congress about their overloaded docket,[23] and in response, Congress gradually reduced the Court's docket by whittling away the types of cases triggering mandatory appellate review.[24] The Court was still, however, required to hear a large number of state court decisions. Specifically, it was compelled to review any judgment by the highest court of a state that sustained state action against a federal constitutional challenge.[25] But relief arrived for the Court in 1988, when Congress finally repealed virtually all mandatory appellate jurisdiction.[26] The current version of the U.S. Code gives the Supreme Court discretion to grant certiorari in state supreme court cases where state statutes are subjected to federal challenges, but it does not mandate appellate review.[27]

During the period of mandatory appellate review of constitutional challenges to state supreme court rulings, the Supreme Court used summary dispositions to manage its weighty caseload. The Rules of the Supreme Court permit the Court to enter summary opinions on the merits "[a]fter considering the . . . [briefs]."[28] Nonetheless, because these opinions offer much less guidance than a full-fledged opinion, confusion has arisen as to how such summary opinions should apply for stare decisis purposes.

This Note conceptualizes summary decisions as falling under one of two categories: (a) decisions that either affirm a lower court's precise application of Supreme Court precedent or correct a lower court's

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[23] *See* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 94–97 (1989) (detailing the history of mandatory appellate review and noting "the Justices' plea to curtail" mandatory jurisdiction).

[24] *Id.* at 94.

[25] *Id.* at 95. For background, the statute that forced the Court's hand was a prior version of 28 U.S.C. § 1257 (2012). *Id.*

[26] *See* Act of June 27, 1988, Pub. L. No. 100-352 § 3, 102 Stat. 662, 662 (providing greater discretion to the Supreme Court in selecting the cases it will review to improve the administration of justice). Very few mandatory appeals remain. Included in this category, however, are appeals from civil injunction cases that are congressionally required to be decided by a three-judge district court panel, and a certain class of antitrust cases where the trial judge finds that Supreme Court review would be of "general public importance." Boskey & Gressman, *supra* note 23, at 97.

[27] 28 U.S.C. § 1257(a) (2012).

[28] SUP. CT. R. 16.

imprecise application or ignorance of precedent, and (b) decisions that decide new issues. The former category, where the Court is doing little more than accurately applying its own rules, conforms to the purpose for which summary decisions are generally used.[29] Existing case law is narrowly applied to a closely analogous set of facts, and the original rule remains in force regardless of the later opinion's precedential weight. In contrast, as I show in Part C, the latter category of summary decisions has wrought confusion in the courts.

B. Stare Decisis Principles and Limitations

This Subpart provides a brief review of the doctrinal background and rationale of precedent as conceptual grounding for understanding why summary opinions should be treated as their own special category of narrowly construed precedent. Stare decisis refers to the doctrine of prior precedent, or the judiciary's mandate to abide by the results of previous decisions in the name of consistency and stability.[30] Under stare decisis, new legal issues before a court are decided based on the perceived applicability of previously decided cases to the facts of the new case. The doctrine is only useful, of course, if the previously decided case was procedurally well-considered. Justice Marshall explained that thorough procedure, including briefing and argument, is important for a decision with precedential power because it reduces the likelihood of mistakes, prevents later confusion, accords respect for lower courts that have thoroughly considered the decision, and avoids upsetting the expectations of litigants who applied for certiorari, among other things.[31]

There are limits to the usefulness of stare decisis,[32] especially in issues of constitutional law. As Justice Louis Brandeis articulated in *Burnet v. Coronado Oil & Gas Co.*, the age-old doctrine arises in part

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[29] *See* Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.").

[30] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1998) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 292 (2005) ("At the root of any argument that judicial precedent is constitutive of constitutional meaning is the notion that the power of the judiciary 'to say what the law is' implies that the law is . . . 'what the judges say it is.'" (footnote omitted)).

[31] Montana v. Hall, 481 U.S. 400, 408–10 (1987) (Marshall, J., dissenting).

[32] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (arguing that the creation of precedent creates discomfort and is best avoided "when one does not have a solid textual anchor or an established social norm from which to derive the general rule").

from a general sense that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[33] Justice Brandeis went on to argue that the Supreme Court should feel free to deviate from precedent in cases that turn on constitutional issues, particularly those that question the reasonableness of state action under the Equal Protection or Due Process Clauses of the Fourteenth Amendment, because such cases require a close examination of the facts.[34] Twelve years later, Justice Stanley Reed expanded on the principle of reduced need for stare decisis in constitutional question cases by asserting that the "accepted practice" resulted from the fact that "correction depends upon amendment and not upon legislative action."[35] Statutory rules can develop through legislative processes as society changes, but since the Constitution is so difficult to amend, Justice Reed acknowledged that our interpretation of the Constitution can (and should) respond to societal norms.

The Court has formally articulated a set of principles defining when stare decisis will be ignored and when precedent will be overturned. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[36] its landmark decision to uphold most of *Roe v. Wade*, the Supreme Court analyzed decades of case law involving stare decisis and identified four key considerations in the decision to overturn prior precedent: (1) the "practical workability" of the existing rule, (2) the impact of societal reliance on the precedent, (3) changes in doctrine such that the earlier rule is "a remnant of abandoned doctrine," and (4) changes in fact or changes in interpretation of facts.[37] As we will see in the next Subpart, the third and fourth prongs of the *Casey* test are in line with the limitations the Supreme Court has placed on the precedential weight of summary opinions.

C. The Precedential Value of Summary Opinions

Frequently, a summary opinion creates such puzzlement in the lower courts that the Supreme Court is compelled to revisit an issue with briefing and argument and deliver a full opinion.[38] For example, a summary affirmance of the constitutionality of a prohibition against

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[33] 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[34] *Id.* at 410.

[35] Smith v. Allwright, 321 U.S. 649, 665 (1944).

[36] 505 U.S. 833 (1992).

[37] *Id.* at 854–85.

[38] *See* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477 (1979) ("It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.").

sodomy[39] led to a circuit split[40] that in turn caused the Supreme Court to take up the same issue again, a decade after the original summary opinion.[41] Similarly, in *Edelman v. Jordan*, the Court overruled three summary affirmances in holding that the Eleventh Amendment's sovereign immunity prevented federal courts from ordering states to make payments that were unconstitutionally withheld.[42] In much the same way, after the summary opinion in *Hutto v. Davis* upheld a forty-year sentence for possession of a small amount of marijuana and expressed strong doubts that the Eighth Amendment could ever be used to review sentence length proportionality,[43] one year later the Court issued the full opinion *Solem v. Helm*, which seemed to make the exact opposite point.[44] This created confusion in the lower courts that remains unresolved.[45] Furthermore, *Hutto*'s opinion was several pages long, not simply one sentence; one-line opinions offer even less guidance to lower courts. Surely not all opinions create quite as much conflict as these, but if the goals are stability and the rule of law, then the many examples of ambiguity created by summary dispositions show how they can serve to undermine this endeavor.

Scholars and even members of the Court believe that summary dispositions can create mass uncertainty and injustice.[46] In fact, in a 1982 letter to Congress advocating for the repeal of mandatory juris-

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[39] Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901 (1976) (upholding the statute with the three words "[a]ffirmed on appeal").

[40] *Compare* Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) ("We consider the decision of the Court in *Doe* to be binding upon us . . . ."), *with* Hardwick v. Bowers, 760 F.2d 1202, 1207–10 (11th Cir. 1985) (finding that the case was outside the bounds of *Doe* and that doctrinal developments had undermined *Doe*'s precedential weight), *rev'd on other grounds*, 478 U.S. 186 (1986).

[41] Bowers v. Hardwick, 478 U.S. 186, 189 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[42] 415 U.S. 651, 670–71 (1974).

[43] 454 U.S. 370, 370–71, 374–75 (1982).

[44] *See* 463 U.S. 277, 288 (1983) ("There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.").

[45] *See* Petition for a Writ of Certiorari at 22–23, Angelos v. United States, 549 U.S. 1077 (2006) (No. 06-26), 2006 WL 1876565 (listing many approaches for determining the significance of *Hutto* in lower courts). *Hutto* was cited by the Court in 2010, with no indication that it was no longer in effect. Graham v. Florida, 560 U.S. 48, 60 (2010).

[46] *See, e.g.*, 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4004.5 (3d ed. 2012) ("The practice increases the risk of erroneous disposition, and must leave at least the losing party feeling victimized by an unfair and unforeseen procedure."); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 232 (1983) ("I have continuously protested against summary dispositions, unless at least all of us believe that the judgment below flatly rejects the controlling authority of one of our decisions."); Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77, 77–78 (1958) (criticizing the unfairness of summary procedure and recommending its abolition).

diction, *all nine* Supreme Court justices signed a statement that summary "dispositions often also provide uncertain guidelines for the courts that are bound to follow them and, not surprisingly, such decisions sometimes create more confusion than they seek to resolve."[47] It seems that no one thinks this is good practice, and it is much less common today now that mandatory jurisdiction is all but eliminated. Yet many one-line opinions written without the benefit of full briefing and oral argument remain "good" law, and the case law listed in this Part is our only guidance on how to interpret them. Stare decisis principles ultimately justify applying the summary decision test very narrowly to the exact facts and issues of prior cases, particularly in constitutional rights cases like *Baker v. Nelson*.

The Supreme Court never developed a coherent test to determine how summary dispositions should be applied to later cases. This created confusion that the Court attempted to resolve in the 1970s, but even then their statements were somewhat inconsistent. In 1975, *Hicks v. Miranda* explicitly stated that the summary disposition would have been binding on the lower court if the issues presented in the cases were "sufficiently the same."[48] The Court also commended the wisdom of a past statement by the Second Circuit: "[I]f the Court has branded a [federal] question as unsubstantial, it remains so except when doctrinal developments indicate otherwise."[49]

Hicks created a relatively open pathway for summary decisions to have broad precedential weight, but the Court quickly retreated from that position, cabining the precedent to situations where almost the exact same issues are presented. In 1977's *Mandel v. Bradley*, the Court narrowed the boundaries of a one-line decision's scope, saying summary decisions "do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."[50] The Court added that the reasoning behind summary dispositions is not necessarily the same as the reasoning in the lower court opinions they affirm.[51] Taking up the issue again in *Illinois State Board of Elections v. Socialist Workers Party*, the Court made statements that have been construed by scholars and lower courts to mean that the summary opinion is controlling only if the jurisdictional state-

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[47] Boskey & Gressman, *supra* note 23, at 93.

[48] 422 U.S. 332, 345 n.14 (1975).

[49] *Id.* at 344 (quoting Port Auth. Bondholders Protective Comm. v. Port of N. Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)).

[50] 432 U.S. 173, 176 (1977) (per curiam).

[51] *Id.*

ment in it "directly address[es]" the issues raised in a later case.[52] Furthermore, in addition to specific limits to the scope of the precedential value, some have also made general claims about their narrow weight. In a 1998 dissent, for example, Justice Scalia wrote that such decisions, particularly when compelled by mandatory jurisdiction, "carried little more weight than denials of certiorari."[53]

The Court's statements about the precedential weight of summary dispositions are confusing and, at times, contradictory. Usually, the Court acknowledges that summary orders are decisions on the merits. For example, in *Hicks*, Justice White quoted and endorsed Justice Brennan's statement that "'[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.'"[54] However, in *Edelman v. Jordan*, Justice Rehnquist commented that summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits."[55] Evidently, the Justices' own opinions on summary opinions differ, resulting in even more uncertainty.

Based on what little guidance we have from the Court, some judges and scholars have attempted to synthesize the precedent into a unified doctrine governing the weight afforded to summary dispositions. The Third Circuit fused the case law and concluded that "the precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed in the jurisdictional statement."[56] The Second Circuit prescribed a specific method for evaluating the precedential weight of summary opinions: "[A] court seeking to apply such a precedent must carefully examine the appellant's jurisdictional statement in order to

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[52] *See* 440 U.S. 173, 182 (1979) ("Although the jurisdictional statement alluded to the State's memorandum, and incorporated it as a separate appendix, at no point did it directly address the question now before us." (citations omitted)); *see also, e.g.*, Francisco Ed. Lim, *Determining the Reach and Content of Summary Decisions*, 8 REV. LITIG. 165, 169 (1989) ("[I]n *Illinois State Board of Elections v. Socialist Workers Party*, the Court ruled that when the jurisdictional statement in a summary case does not directly address the question currently before a court, the summary decision is not controlling." (footnote omitted)).

[53] Hohn v. United States, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting); *see also* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1293 & n.472, 1294–99 (1979) (listing a number of commentators who have argued that "summary affirmances and dismissals for insubstantiality are entitled to little more precedential weight than denials of certiorari, perhaps no more," and suggesting that the Supreme Court may be unwilling to admit to the tentative nature of its examination of the merits in summary opinions due to "separation of powers" concerns).

[54] Hicks v. Miranda, 422 U.S. 332, 344 (1975) (alteration in original) (quoting Ohio v. Price, 360 U.S. 246, 247 (1959)).

[55] 415 U.S. 651, 671 (1974).

[56] Lecates v. Justice of Peace Court No. 4 of Delaware, 637 F.2d 898, 904 (3d Cir. 1980).

determine which questions the Supreme Court necessarily decided."[57] In line with the legal community's love of multiprong tests, William J. Schneier created a four-part test to evaluate the precedential weight of summary opinions from Supreme Court opinions:

> [T]o determine the precedential value of a summary disposition, a court must: 1) make certain that there are no legally significant differences between the facts of the case before it and the facts of the case that was summarily adjudicated; 2) examine the jurisdictional statement to determine which issues were directly presented to the Supreme Court in the summarily adjudicated case; 3) determine which of the issues presented to the Court were necessarily decided by the summary disposition; and 4) determine whether there have been doctrinal developments that supersede the summarily adjudicated case.[58]

To state the central themes of these different approaches more concisely, a summary opinion will have precedential weight if (a) there are no significant doctrinal developments that would cast doubt on the applicability of the prior rule and (b) the facts and issues presented in the next case are substantially similar to those necessarily decided in the summary opinion.[59] Part II analyzes the doctrinal developments prong of the test,[60] and Part III examines differences in the facts and issues.

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[57] Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287, 1295 (2d Cir. 1981), *aff'd in part, vacated in part on other grounds sub nom.* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

[58] William J. Schneier, *The Do's and Don'ts of Determining the Precedential Value of Supreme Court Summary Dispositions*, 51 BROOK. L. REV. 945, 960–61 (1985) (internal citations omitted).

[59] This summation synthesizes the four-prong test with the *Lecates* and *Kramarsky* tests. I have restated them to concisely articulate the two parts of the argument developed below in Parts II and III.

[60] Despite the seemingly clear test laid out by the circuit courts and scholars, it is arguable that *Hicks*'s remark on "doctrinal developments" only applies if the Supreme Court explicitly mentions the summary opinion in a later case and actively overrules it. The *Hicks* Court did state that "lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (alterations in original) (quoting Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir.), *cert. denied sub nom.* Doe v. Brennan, 414 U.S. 1096 (1973)). However, courts have read the doctrinal developments phrasing in a broader sense. In a Third Circuit case, for example, the indigent Richard Lecates challenged a Delaware law that required a surety bond before he could appeal from a ruling by a lawyer-judge to a state trial court. *Lecates*, 637 F.2d at 902. The district court believed Lecates's case was foreclosed by *Caulk v. Nichols*, 408 U.S. 901 (1972), a Supreme Court summary dismissal of a challenge to the same statute, with similar facts. *Lecates*, 637 F.2d at 902. However, an intervening Supreme Court order "not[ing] probable jurisdiction," *Patterson v. Warner*, 411 U.S. 905 (1972), in another similar case was deemed a sufficient doctrinal development to help convince the Third Circuit that *Caulk* was not controlling. *Lecates*, 637 F.2d at 906. One can find similar reliance on later case law, as opposed to explicit overrulings, to reduce the weight of

II
THE RELEVANCE OF *BAKER V. NELSON* IN LIGHT OF LATER DOCTRINAL DEVELOPMENTS

The first prong of the test for evaluating the precedential weight of summary opinions examines whether significant doctrinal developments might cast doubt on the continued applicability of an established rule. Federal courts today are split on the relevance of *Baker*. Some courts have asserted that doctrinal developments have removed any precedential weight from the summary opinion, effectively bypassing *Baker*. Other courts have held that *Baker* continues to preclude legitimate federal challenges to state laws against same-sex marriage. In Part II.A, I discuss the varying ways courts have dealt with *Baker* and argue that each method is open to criticism. In Part II.B, I contend that contrary to what these courts have argued, the most important doctrinal development is not a case that relates to same-sex equal protection jurisprudence, but a case that requires strict scrutiny of infringements on the fundamental right to marry.

A. Courts Using More Recent Cases to Bypass Baker

Several courts have attempted to bypass *Baker* as precedent by citing recent Supreme Court decisions on same-sex marriage. However, each of these attempts is open to serious criticism.

1. Courts Using Windsor *to Bypass* Baker

Recently, a number of federal cases have relied on the Court's holding in *United States v. Windsor*[61] as the key doctrinal development allowing the courts to ignore *Baker* as precedent. For example, the lower court ruling overturning Utah's constitutional ban on same-sex marriage determined that after *Windsor* and *Hollingsworth v. Perry*,[62] "there is no longer any doubt that the issue currently before

summary opinions in the Second Circuit. *See Kramarsky*, 666 F.2d at 22–23 (holding that *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), was a doctrinal development that nullified *Minnesota Mining & Manufacturing Co. v. Minnesota*, 444 U.S. 1041 (1980), and thereby finding that ERISA preempted the New York Human Rights Law). The Ninth Circuit also concurs. *See* Jones v. Bates, 127 F.3d 839, 851 n.13 (9th Cir. 1997) (holding that a number of later cases created doctrinal developments that nullified *Moore v. McCartney*, 425 U.S. 946 (1976), and thereby finding that challenge to a constitutional amendment which created lifetime term limits was allowed). There is no circuit that abides by a definition of "doctrinal developments" that requires explicit overruling.

[61] 133 S. Ct. 2675 (2013). *Windsor* is the landmark case invalidating the Defense of Marriage Act on Fifth Amendment grounds. *Id.* at 2696.

[62] 133 S. Ct. 2652 (2013). Like *Windsor*, *Perry* involved substantial consideration of same-sex marriage rights under the Federal Constitution, but *Perry* was ultimately dismissed for lack of standing. *Id.*

the court in this lawsuit presents a substantial question of federal law."[63] Similarly, the case overturning Oklahoma's constitutional ban on same-sex marriage listed a number of intervening doctrinal developments, with *Windsor* as the capstone.[64]

Although *Windsor* is a significant development in same-sex marriage jurisprudence, arguments using *Windsor* to bypass *Baker* are vulnerable to powerful rebuttals. *Baker* challenged the actions of a state and was therefore based on the Fourteenth Amendment.[65] *Windsor*, however, involved the actions of the federal government, and was therefore based on the Fifth Amendment. Both amendments use similar language, but the doctrines governing each have developed differently. This is why, for example, the Supreme Court needed two opinions to fully desegregate public schools: *Brown v. Board of Education* for state governments[66] and *Bolling v. Sharpe* for the federal government.[67] Given that neither the majority nor any of the dissents in *Windsor* so much as mention *Baker v. Nelson*, it is reasonable to infer that the Court did not find *Baker* to be on point for cases involving federal statutes.

In fact, Chief Justice Roberts's dissent in *Windsor* specifically noted that *Windsor* was decided for the plaintiffs precisely because it arose under a federal statute.[68] This point was echoed in Justice Kennedy's majority opinion, which is rife with federalism concerns. Specifically, Justice Kennedy noted that although DOMA is invalid for reasons of animus,[69] the animus was particularly visible because Congress tried to supersede the states, since domestic matters are the purview of states rather than the federal government. Justice Kennedy wrote:

> The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the

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63 Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013).

64 Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1264 (N.D. Okla. 2014).

65 Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("Petitioners contend . . . [they] are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.").

66 347 U.S. 483 (1954).

67 347 U.S. 497 (1954).

68 United States v. Windsor, 133 S. Ct. 2675, 2697 (2013) (Roberts, C.J., dissenting) ("The dominant theme of the majority opinion is that the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells. . . . [I]t is undeniable that its judgment is based on federalism." (citations omitted)).

69 *See id.* at 2693 (majority opinion) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.").

> State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[70]

Language about states' "unquestioned authority" and their "responsibility . . . for the regulation of domestic relations"[71] implies a high level of deference toward state-level decision-making. This suggests that the real indication of prejudice in DOMA was the federal government's refusal to acquiesce to the states' decisions. In fact, Justice Kennedy refers to the injured class not as same-sex couples, but as "persons who are joined in same-sex marriages made lawful by the State,"[72] leaving open the question whether he would be just as willing to overturn a state law banning same-sex marriage. Therefore, *Windsor* may be read as a decision driven more by federalism concerns than by a desire for universal marriage equality.[73]

The courts that have disregarded *Baker* based on *Windsor* considered these inapposite factors. The *Bishop v. United States ex rel. Holder* opinion admits that "none [of the doctrinal developments] is directly on point as to the questions presented in *Baker* (or here) . . . ."[74] Similarly, the court in *Kitchen v. Herbert* stated that "the Court's decision in *Windsor* does not answer the question presented here, but its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development."[75] Perhaps the Utah court is correct, but the holding is susceptible to criticism that the term "doctrinal developments" refers only to those that would more directly address the issues presented in the later case.

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 2695.

[73] *See* Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSblog (June 27, 2013, 3:49 PM), http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/ (noting the *Windsor* decision's solicitude for state sovereignty).

[74] Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1276 (N.D. Okla. 2014).

[75] Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013).

2. *Courts Using* Lawrence*,* Romer*, or Other Cases to Bypass* Baker

Particularly pre-*Windsor*, courts used other cases to assert that *Baker* no longer applied. One Washington state bankruptcy case involved a DOMA challenge by a lesbian couple who married in Canada.[76] On the issue of whether *Baker* was still relevant, the court cited *Lawrence v. Texas*[77] and argued that the "Court's approach to the constitutional analysis of same-sex conduct . . . arguably appears to have shifted."[78] The court held that *Baker* did not apply, at least partially because of the later development of *Lawrence*.[79]

Similarly, the Second Circuit's *Windsor* opinion conducts an analysis that gives a full account of forty years of equal protection jurisprudence and suggests that the development of intermediate scrutiny in *Craig v. Boren*[80] and its progeny, combined with the suspect classifications for gays and lesbians in *Lawrence* and *Romer v. Evans*,[81] were sufficient doctrinal developments to render *Baker* irrelevant.[82] In the Ninth Circuit opinion on California's Proposition 8, the majority found that *Baker* did not apply, narrowly framing the factual scenario of the case as "whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state."[83] They found that the question was directly controlled by *Romer*, not *Baker*.[84]

Some of these approaches hold more water than others, but all have holes. Reliance on *Lawrence* and *Romer* indicates that the two cases developed a heightened scrutiny standard that has gone unidentified by the Supreme Court. This standard, which scholars call "rational basis with bite" or "rational basis with teeth,"[85] functions to overturn any law motivated primarily by animus. The original rational

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[76] *In re* Kandu, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004).

[77] 539 U.S. 558, 578 (2003) (holding that laws against homosexual sodomy are unconstitutional).

[78] 315 B.R. at 138.

[79] *Id.*

[80] *See* 429 U.S. 190, 197 (1976) (reviewing gender-based discrimination with intermediate scrutiny).

[81] *See* 517 U.S. 620, 623–24 (1996) (holding unconstitutional a state constitutional amendment that repealed all municipal ordinances prohibiting discrimination on the basis of homosexual conduct).

[82] Windsor v. United States, 699 F.3d 169, 179 (2d Cir. 2012).

[83] Perry v. Brown, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012), *rev'd on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[84] *Romer*, 517 U.S. at 620.

[85] The term "rational basis with teeth" was coined in 1985 by Northwestern University Professor Victor Rosenblum, who stated that the new standard was likely created due to

basis review test, as stated in *United States v. Carolene Products Co.*, is, at least in theory, extremely deferential because it upholds any law unless "it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[86]

However, many cases have used this form of review to overturn laws justified by rational motives. For example, in a quintessential rational basis with bite case, *City of Cleburne v. Cleburne Living Center, Inc.*, the Court refuted each of the City's arguments in favor of the ordinance regulating the location of a home for the mentally disabled.[87] American University Professor Herman Schwartz, who worked on Cleburne Living Center's brief,[88] acknowledged that rational basis review should have sustained the discriminatory ordinance, but that the Court essentially treated the mentally disabled as if they constituted a suspect class.[89]

Overturning *Baker* on the basis of cases such as *Cleburne*, *Lawrence*, and *Romer* is problematic because the Supreme Court has never acknowledged that rational basis with bite is an independent standard. Therefore, from a doctrinal perspective, the Court would likely describe itself as merely applying rational basis review as developed in *Carolene Products*.[90] Moreover, even if rational basis with bite were applied, it is an incredibly vague standard that offers little guidance on how much animus is necessary to overturn a law, how animus should be measured, and whether animus should be balanced against other considerations.[91] Thus, even if rational basis with bite had existed, one cannot be certain that it would have led to a different outcome in *Baker*. Similarly, reliance on *Craig v. Boren* is unhelpful because the Supreme Court has never held that intermediate scrutiny applies to classifications affecting gays or lesbians or to any marriage equality cases.

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the Court's distaste for intermediate level scrutiny. David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112, 116 (1985).

[86] 304 U.S. 144, 152 (1938).

[87] 473 U.S. 432, 448–50 (1985).

[88] Stewart, *supra* note 85, at 112.

[89] *Id.*

[90] *See* Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) ("[T]he Supreme Court's failure to articulate its more searching form of rational basis review, or what has been called 'rational basis with bite,' used in *Romer*, *Lawrence*, and other related opinions, has led to inconsistent judgments in the federal court system as lower courts remain reluctant to veer from traditional deferential review." (footnote omitted)).

[91] *See id.* at 2786 ("Lacking clear guidance as to the applicability of rational basis with bite, . . . [cases] rely exclusively on traditional rational basis review.").

3. *Courts Holding that* Baker *Still Applies*

Some courts merely hold that *Baker* still applies, most notably *Conde-Vidal*.[92] The Puerto Rico District Court shared the doubts expressed in the previous Subparts: that *Romer*, *Lawrence*, and *Windsor* are all inapposite.[93] The court analyzed the cases and found that the issues presented in each case simply did not relate to a state's right to define marriage, pointing out that "[t]he *Windsor* opinion did not create a fundamental right to same-gender marriage."[94]

Most cases that upheld *Baker*, particularly before 2014, engaged in far less thoughtful analysis. A Florida District Court, for example, simply cited *Hicks* and stated that *Baker v. Nelson* was controlling authority for a similar challenge to Florida state law.[95] In addressing plaintiffs' arguments that *Baker* preceded many important developments in the gay rights movement, including *Lawrence*, the court merely cited general statements by the Supreme Court that lower courts should not read the Supreme Court's opinions implicitly to overrule earlier decisions.[96] Furthermore, as discussed in the Introduction, the District Court of Nevada has heard a challenge to that state's same-sex marriage prohibition and found that it was precluded by *Baker*.[97]

Occasionally, courts that uphold *Baker* have tried to distinguish the questions addressed in major gay rights decisions from the question of whether states can prohibit same-sex marriage. The First Circuit correctly observed that although protection for gays and lesbians prevailed at the Supreme Court level in *Lawrence* and *Romer*, those cases do not say that "the Constitution requires states to permit same-sex marriages."[98] In another case, a gay Hawaiian couple challenging a statute prohibiting same-sex marriage argued that *Baker* no longer applied as a result of *Lawrence* and *Romer*.[99] The Hawaiian District Court discussed the two earlier opinions and found that, while both indicated that the Supreme Court was willing to allow some protections of gays and lesbians as a class, *Lawrence*'s holding applied only to prohibitions of consensual sexual conduct, and *Romer* also did not overrule *Baker*.[100]

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92 Conde-Vidal v. Garcia-Padilla, No. 14-1253, slip op. at 19 (D.P.R. Oct. 21, 2014), *available at* https://www.scribd.com/doc/243888222/3-14-cv-01253-57-Puerto-Rico-Decision.

93 *Id.* at 12.

94 *Id.* at 16.

95 Wilson v. Ake, 354 F. Supp. 2d 1298, 1304–05 (M.D. Fla. 2005).

96 *Id.* at 1305.

97 Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012).

98 Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012).

99 Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1085 (D. Haw. 2012).

100 *Id.* at 1085–86.

Other courts' treatments of *Baker* are just confusing. In the Eighth Circuit's *Bruning* case, advocates for gay Nebraskan couples raised an Equal Protection challenge to the state's constitutional amendment prohibiting same-sex marriage.[101] The Circuit Court ignored *Baker* and commenced a thorough discussion of the merits in the second section of its opinion.[102] But in the conclusion, it mentioned *Baker* and commented "[t]here is good reason for [its] restraint."[103] Since the court was aware of *Baker*, but did not cite to it in its Equal Protection analysis, it would appear that the Eighth Circuit believed *Baker* persuasive but not controlling. However, it is unclear whether this is the message that a reader is supposed to glean.

Aside from *Conde-Vidal*, these cases are analytically problematic because they fail to give much consideration to the possibility that later developments might undermine *Baker*'s precedential weight. For example, the Nevada District Court in *Sevcik v. Sandoval* did not consider that doctrinal developments may have undermined *Baker*'s relevance (though it did agree with the Ninth Circuit's *Perry* opinion that *Romer* created a different category of analysis when preexisting rights are withdrawn by state action).[104] Given cases like *Mandel*[105] and *Illinois State Board of Elections*,[106] it appears unhelpful to aver general claims about the importance of precedent, as the Florida District Court did. Rather, the precedent on summary dispositions requires an examination of doctrinal developments. While some could argue that *Romer* and *Lawrence* are adequate doctrinal developments because, at the time of *Baker*, the Supreme Court had never used the Equal Protection Clause to protect gays and lesbians at all,[107] or some (like the court in *Conde-Vidal*) could find that no Supreme Court decisions has been relevant enough in this field to overrule *Baker*, I posit that there is an intervening doctrinal development more important than *Lawrence*, *Romer*, and even *Windsor*, but which courts have generally ignored in their treatment of this issue.

B. Zablocki*: An Alternative to Bypass* Baker

In 1978, the Supreme Court decided *Zablocki v. Redhail*, which held that the right to marry was a fundamental right worthy of protec-

101 Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863 (8th Cir. 2006).
102 *Id.* at 864–69.
103 *Id.* at 870–71.
104 Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012).
105 Mandel v. Bradley, 432 U.S. 173 (1977).
106 Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).
107 For examples, see *supra* Part II.A.2.

tion through strict scrutiny.[108] Because the Supreme Court has said doctrinal developments can undermine the precedential weight of a summary disposition[109] and because *Zablocki* represents a major doctrinal development on the issue of marriage law in general, including same-sex marriage law, the weight of *Baker* should be de minimis after *Zablocki*.

Court opinions addressing *Baker* fail to afford proper weight to developments in jurisprudence about the Due Process Clause–based fundamental right to marry.[110] Perhaps courts believe that the fundamental Due Process right to choose one's marital partner was created in *Loving v. Virginia*,[111] five years before *Baker*. But that is not what courts believed in the immediate wake of *Loving*, and it is not what the Minnesota Supreme Court believed in *Baker*.

In *Loving v. Virginia*, the Supreme Court articulates at some length the reasons why antimiscegenation statutes violate the Equal Protection Clause and mentions the Due Process Clause almost as an afterthought.[112] In these paragraphs, the Court refers to marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival"[113] and goes on to say that "[t]o deny this fundamental freedom on so unsupportable a basis as . . . racial classifications . . . is surely to deprive all the State's citizens of liberty without due process of law."[114]

Nonetheless, for a full decade after *Loving*, most courts found that its holding applied to racial classifications of marriage alone. One can see this conclusion present in the Minnesota Supreme Court's opinion of *Baker v. Nelson*, which distinguishes *Loving* by saying, "Virginia's antimiscegenation statute, prohibiting interracial marriages, was invalidated *solely* on the grounds of its patent racial discrimination."[115] A similar argument can be found in a Utah case in which a woman sued to marry a prisoner. The Utah Supreme Court dismissed the notion that *Loving* made marriage a fundamental right under the Constitution, remarking that "[r]acial problems, not marriage, per se, have been the subject of constitutionality, where mar-

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108 434 U.S. 374, 388 (1978).

109 *See supra* Part I.A (synthesizing Supreme Court doctrine on the weight of summary opinions, including the requirement that there be no intervening doctrinal developments).

110 *See supra* Part II.A (explaining ways that courts have ignored *Baker* on Equal Protection Clause grounds, but finding no courts asserting doctrinal developments to bypass *Baker* on Due Process Clause grounds).

111 388 U.S. 1 (1967).

112 *See id.* at 12 (spending less than 200 words discussing the Due Process Clause claim).

113 *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

114 *Id.*

115 Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (emphasis added).

riage is not . . . ."[116] For another example, in a 1976 Second Circuit appeal, a disabled widow challenged the Social Security Act's provision that denied disability benefits if the widow remarried before she turned sixty years old.[117] In dismissing the widow's Due Process Clause claim that the Social Security Act infringed on a fundamental right, the Second Circuit distinguished *Loving* by essentially stating that *Loving* only applied if there were "a total bar to marriage [or] an invidious racial classification . . . ."[118] The opinion also asserts that "*Loving* did not hold that the right to marry is 'fundamental,' as that term is understood in an equal protection context."[119] Indeed, in a 1980 scholarly project detailing developments in constitutional family law, the *Harvard Law Review* put it succinctly: "Since *Loving* did not definitively state that the right to marry was fundamental, however, courts frequently restricted the precedent to the racial discrimination holding, rejecting the argument that the case had recognized a fundamental right to marry."[120] The Harvard project goes on to say that "[n]ot until 1978 did the Supreme Court unequivocally state that the right to marry is fundamental."[121]

That statement, in the case *Zablocki v. Redhail*,[122] finally removed the ambiguity from this doctrine and clarified the constitutional standard governing the legitimacy of a regulation restricting marriage. *Zablocki* involved a challenge to a Wisconsin law requiring noncustodial parents under an obligation to provide child support to obtain a court order before they could marry.[123] For the first time, the Supreme Court explicitly used the term "fundamental right" to refer to the freedom to marry.[124] Writing for the Court's majority, Justice Marshall articulated a test for reviewing statutory classifications that significantly interfere with fundamental rights: "[Such a statutory classification] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[125] This test melds the different forms of heightened scrutiny, combining a variation of the "narrowly tailored" language of

116 *In re* Goalen, 512 P.2d 1028, 1028–29 (Utah 1973).

117 Goldberg v. Weinberger, 546 F.2d 477, 478–79 (2d Cir. 1976).

118 *Id.* at 480 n.4.

119 *Id.*

120 *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1249 (1980).

121 *Id.* at 1250.

122 434 U.S. 374 (1978).

123 *Id.* at 375.

124 *Id.* at 388.

125 *Id.*

the strict scrutiny test[126] with language similar to the "important governmental objectives" language of intermediate scrutiny.[127]

The Supreme Court later reaffirmed that freedom of choice in marriage is a fundamental right in *Turner v. Safley*, a case concerning a Missouri regulation requiring prisoners to obtain a prison official's approval in order to marry.[128] The Court struck down the regulation, finding it did not pass the scrutiny that such marriage restrictions required.[129] In subsequent federal cases, the circuits have simply applied a pure strict scrutiny analysis in evaluating infringements on the right to marry.[130]

Before *Zablocki*, most courts, including the Minnesota Supreme Court (which decided *Baker*) did not believe that *Loving* applied to nonracial marital classifications.[131] After *Zablocki*, no court can deny that the right to marriage is a fundamental right and that regulations significantly limiting marriage must be subjected to the highest scrutiny.[132] In 2005, Cass Sunstein wrote that "any 'direct and substantial' interference with the right to marry would be strictly scrutinized [under *Zablocki*]," which would include bans on same-sex marriage.[133] Given that the Minnesota *Baker* opinion dismisses the fundamental right argument with little fanfare,[134] it unquestionably would have had to craft a different analysis if *Zablocki* had been the law on the books at the time, since a ban on same-sex marriage is clearly a significant interference with the right to marry.

Hence, the doctrinal development of *Zablocki* deals more directly with same-sex marriage jurisprudence than *Lawrence* or *Romer*. Yet the Supreme Court has never confronted the decision of

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126 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (describing the "narrowly tailored" standard).

127 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (utilizing the "important government objectives" standard).

128 482 U.S. 78, 81–82 (1987).

129 *Id.* at 81. The Court reviewed the regulation using a "lesser standard of [strict] scrutiny." *Id.*

130 *See, e.g.*, McCabe v. Sharrett, 12 F.3d 1558, 1566 (11th Cir. 1994) (applying strict scrutiny to the demotion of a police department secretary who claimed she was transferred to a worse position because she married a police officer); Vance v. Rice, 524 F. Supp. 1297, 1301 (S.D. Iowa 1981) (applying strict scrutiny to a pretrial detainee's claim that his right to marry was violated when state officials prevented him from marrying a material witness in his case).

131 *Supra* notes 115–19 and accompanying text.

132 *But cf.* Zablocki v. Redhail, 434 U.S. 374, 407 (1978) (Rehnquist, J., dissenting) (disagreeing with "the Court's conclusion that marriage is the sort of 'fundamental right' which must invariably trigger the strictest judicial scrutiny").

133 Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2088 (2005).

134 *See* Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971) (rejecting the application of heightened scrutiny to marriage restrictions).

whether to apply *Zablocki*'s strict scrutiny to state laws banning same-sex marriage in part because *Baker* has prevented many cases that raise this issue from making it to the Court's docket.[135] Because *Zablocki* is a post-*Baker* doctrinal development that robustly protects marriage rights and is directly on point in same-sex marriage litigation, *Baker*'s effect on the doctrine should be null.

III
The Facts and Jurisdictional Statement of *Baker v. Nelson*

The second prong of the test for evaluating the precedential weight of summary opinions examines whether the facts and issues presented by the instant case are substantially similar to those decided in the summary opinion. Most courts that address *Baker*'s impact on state laws do so by considering intervening doctrinal developments.[136] Rarely do federal courts consider the possibility that *Baker* presented facts and issues that are very different from modern cases. Evaluating the precedential weight of cases like *Baker*, therefore, calls for a detailed factual analysis.[137] The Supreme Court and, indeed, all federal courts, believe that it is important to compare the facts of each case to determine how definitively the summary order applies. In this Part, I will argue that *Baker* concerned a different type of discrimination claim (bias in the administration of a neutral law) than that considered in modern cases (bias in the law itself). Further, a review of the facts indicates that, in contrast to modern cases, the courts viewed *Baker* as a sex discrimination case, not a case related to sexual orientation.

In cases attacking state same-sex marriage laws, courts generally examine the *Baker* jurisdictional statement, assume that the current case involves the same issues, and restrict their commentaries to doctrinal developments.[138] Courts should use the Third Circuit's methodology and examine the summary opinion's jurisdictional statement to determine which issues are presented.[139] Using this method, the jurisdictional statement of *Baker* seems to present issues similar to any other state challenge:

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135 *Supra* Part II.A.3.

136 *See supra* Part II.A (describing these cases).

137 *See* Mandel v. Bradley, 432 U.S. 173, 177 (1977) (per curiam) ("The precedential significance of the summary action . . . is to be assessed in the light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case.").

138 *E.g.*, Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1085 (D. Haw. 2012).

139 *See supra* note 56 and accompanying text (describing the Third Circuit's view).

> 1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.[140]

One might assume based on this jurisdictional statement that, by denying Baker's claims, the Supreme Court has barred all Fourteenth Amendment arguments against state-level same-sex marriage prohibitions. However, a closer reading of the jurisdictional statement and facts reveal that *Baker* was indeed a very different case from *Conde-Vidal*.

A. Different Forms of State Action

Today, nearly every state, in their constitutions, statutes, or case law, has explicitly addressed what sex couples must be in order to be legally eligible for marriage.[141] At the time *Baker* was decided, however, the state of Minnesota had *no* specific legal provisions regarding who could or could not marry.[142] When Baker and his husband-to-be were denied a marriage license, it was because of the Hennepin County District Court Clerk's personal understanding of the historical definition of marriage, not because of any legal requirement.[143] The fact that Baker could not marry his partner boiled down to a court clerk's decision that granting a marriage license to two men seemed inadvisable.[144] Although "marriage" was at the time commonly understood to refer to different-sex partnerships,[145] the fact remains that the statute itself was silent on this classification.

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[140] Jurisdictional Statement at 3, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

[141] *See* Paul Benjamin Linton, *Same-Sex Marriage and the New Mexico Equal Rights Amendment*, 20 GEO. MASON U. C.R. L.J. 209, 209–10 (2010) (listing state constitutions and state statutes that have limited marriage to between a man and a woman, and the five states that have neither addressed same-sex marriage nor expressly limited it to heterosexual couples).

[142] *See* Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971) (noting "the absence of an express statutory prohibition against same-sex marriages").

[143] *See id.* (noting that it was "undisputed that there were otherwise no statutory impediments to a heterosexual marriage").

[144] *See id.* ("Gerald R. Nelson, clerk of Hennepin County District Court, . . . declined to issue the license on the sole ground that petitioners were of the same sex . . . .").

[145] The Minnesota Supreme Court even consulted multiple dictionaries to prove this common usage in support of its statutory construction. *Id.* at 186 n.1.

Further, *Baker*'s jurisdictional statement refers to "appellee's *refusal* to sanctify appellants' marriage" as the challenged state action, rather than to any specific regulation or provision.[146] This language was necessary because there was no law on the books to contest. Constitutional challenges could not be mounted on the basis of a discriminatory dictionary. Hence, the difference between both the factual situation and the jurisdictional statement of *Baker* and the typical present-day same-sex marriage case is that current cases challenge facially discriminatory state (or federal) laws,[147] whereas *Baker* challenged a single instance of the discriminatory administration of a facially neutral state law.

1. Discriminatory Laws Versus Discriminatory Administration

Because the Supreme Court has generally been more suspicious of discriminatory laws than it has of the discriminatory administration of facially neutral laws,[148] *Baker* is markedly different from modern same-sex marriage cases. In contrast to their oft-liberal analysis of discriminatory laws, the Supreme Court almost always looks upon challenges to facially neutral laws with great skepticism, finding discriminatory discretionary administration of a facially neutral law to be neither subject to heightened scrutiny nor legitimate grounds for a

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146 Jurisdictional Statement, *supra* note 140, at 3 (emphasis added).

147 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (holding unconstitutional the Defense of Marriage Act, 1 U.S.C. § 7 (2012)); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1274 (N.D. Okla. 2014) (holding unconstitutional OKLA. CONST. art. 2, § 35(A), which defined marriage as between a man and a woman); Garden State Equal. v. Dow, 79 A.3d 1036, 1044 (N.J. 2013) (holding unconstitutional the Civil Union Act, N.J. STAT. ANN. §§ 37:1-28, -33 (West 2007), which allowed gay couples to enter into civil unions but not to marry).

148 It did not always seem like this would be true. The Court specifically addressed this issue in 1886's *Yick Wo v. Hopkins*, in which it considered an ordinance which required a permit from the San Francisco Board of Supervisors in order to operate a laundry in a wooden building. 118 U.S. 356, 357 (1886). The petitions of over two hundred Chinese immigrants who had been operating laundries in San Francisco for over twenty years were denied, whereas all non-Chinese laundry owners except one had their petitions granted. *Id.* at 359. The Supreme Court invalidated the law based on its practical impacts rather than its text, declaring that the facts showed that "*whatever may have been the intent of the ordinances as adopted*, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws [provided by the Fourteenth Amendment] . . . ." *Id.* at 373 (emphasis added). But the trend of the Court's jurisprudence indicates that *Yick Wo* is all but obsolete, particularly in language that suggests there is no need to inquire into the intent behind the law's passage. *See* Washington v. Davis, 426 U.S. 229, 245 (1976) ("[T]o the extent that [earlier] cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."). In fact, *Yick Wo* is the only instance in which the Supreme Court has ever overturned a prosecution as motivated by race. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1359.

Fourteenth Amendment challenge. For example, in *Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court found that the refusal of the Arlington Heights Planning Commission to rezone a certain tract of land to allow for multifamily housing did not violate any equal protection guarantees despite its disparate impact on low-income minorities. The Court held the developers "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[149] Similarly, in *McCleskey v. Kemp*, the Supreme Court upheld the capital conviction of an African American man despite robust statistical evidence of racial disparities in Georgia's administration of the death penalty.[150] The statistics were striking, but the Court dismissed the appeal, holding that McCleskey failed to show that the decision-makers who sentenced him "acted with discriminatory purpose."[151] The opinion evinced a certain deference to state officials acting on discretionary terms: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[152] Similarly, in a public employment context, the Court has reiterated that sometimes "treating like individuals differently is an accepted consequence of the discretion granted."[153]

Moreover, the Supreme Court decisions involving allegedly discriminatory discretionary decision-making, as opposed to allegedly discriminatory legislative enactments or democratic referenda, do not use heightened scrutiny classifications. *Yick Wo v. Hopkins* predates heightened scrutiny,[154] and *McCleskey* and its ilk were decided without heightened scrutiny because the Court never drew the inference that the differences in treatment arose from suspect classifications.[155]

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149 429 U.S. 252, 270 (1977).

150 *See* 481 U.S. 279, 286 (1987) (describing the Baldus study).

151 *Id.* at 297.

152 *Id.*

153 Engquist v. Or. Dep't of Agric., 553 U.S. 591, 603 (2008).

154 Heightened scrutiny was developed based on the famous Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938). See *supra* note 86 and accompanying text for a discussion of *Carolene Products*' broader holding related to rational basis review. The first Supreme Court case to use the term "strict scrutiny" was *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006). For more information on *Yick Wo*, see *supra* note 148.

155 *See McCleskey*, 481 U.S. at 291–99 (discussing and rejecting McCleskey's equal protection claims); *see also id.* at 342 (Brennan, J., dissenting) (claiming the majority reached its conclusion "by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race").

2. *The Impact of Discriminatory Administration Doctrine on* Baker*'s Facts and Issues*

Baker also involves the administration of a vague law. Gerald Nelson was tasked with interpreting and implementing Minnesota marriage statutes, and he found that "sufficient legal impediment" prevented him from issuing a marriage license to two men.[156] If one were to think that statement sounded vague, Baker would agree: According to his jurisdictional statement, "no specific reason has ever been given for not issuing the license."[157] *Baker v. Nelson* involved an ambiguous, facially neutral statute and an administration of such that interpreted the law based on a then-common understanding of marriage.

Proving a Fourteenth Amendment violation in *Baker* was a very different task from proving such violations in modern cases. As discussed above, today nearly all states have contemplated and explicitly decided the legality of same-sex marriage.[158] Unlike a decision by one clerk, lawmaking requires extensive record-keeping. Courts have evidence, such as legislative histories, with which to determine the existence of a discriminatory purpose. In *Windsor*, for example, the Supreme Court consulted the *Congressional Record* and found that the House report discussed Judeo-Christian values and moral disapproval as key reasons for passing the Defense of Marriage Act.[159] By comparison, in *Baker*, the Court possessed no documentation of the rationales behind the state action.

Continuing along this vein, one could easily see how a legislative enactment could be seen as far more constitutionally troubling than one refusal to issue a license. *Baker* concerns only one couple, not a class of harmed individuals. A vague marriage statute could be seen as an invitation to all court clerks to decide for themselves whether same-sex marriage is legitimate; after all, some same-sex marriages predated widespread anti–marriage equality legislation.[160] The Court

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156 Jurisdictional Statement, *supra* note 140, at 4 (quoting Nelson's letter to Baker denying Baker a marriage license).

157 *Id.*

158 *Supra* note 141 and accompanying text.

159 United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

160 *See* Suzanne Herel, *San Francisco Not the First to Marry Couples of the Same Gender*, S.F. CHRON. (Feb. 14, 2004), at A16, *available at* http://www.sfgate.com/news/article/San-Francisco-not-the-first-to-marry-couples-of-2796687.php (recounting the story of a Boulder, Colorado, county clerk who issued six same-sex marriage licenses in 1975 after obtaining an advisory opinion from the district attorney's office that the current marriage law did not prohibit such unions); *see also Developments in the Law: The Constitution and the Family*, *supra* note 120, at 1275 n.136 (noting reports of homosexual partners managing to marry).

may have believed it was a matter for legislatures—not the judiciary—to specify one path or another, if they did not want to delegate to clerks. Current statutes and constitutions, however, remove all ambiguity and impact everyone in their jurisdictions.[161] The widespread impact and animus are more obvious. And given the very limited precedential weight of summary opinions,[162] these factual differences justify refusing to apply *Baker* to an actual anti-equality statute.

B. Sex Discrimination Versus Sexuality Discrimination

The other key difference between *Baker* and modern same-sex marriage litigation is that *Baker* was framed and decided as a sex discrimination case. The jurisdictional statement never uses the words "gay" or "homosexual"; it simply refers to both partners being "of the male sex."[163] Similarly, the Minnesota Supreme Court opinion does not use the terms "gay" or "homosexual," and while it does refer to the "prohibition of a same-sex marriage," it does not use the terms "same-sex couple" or "same-sex relationship."[164]

Modern courts, on the other hand, frame same-sex marriage in terms of the equal dignity of gay and lesbian relationships and eschew the notion that same-sex marriage is about gender-based classifications. In oral arguments for *Hollingsworth v. Perry*, Chuck Cooper provides this background: "We do not think it is properly viewed as a gender-based classification. Virtually every appellate court, State and Federal, with one exception, Hawaii, in a superseded opinion, has agreed that it is not a gender-based classification . . . ."[165] To interpret Cooper's summary, courts now seem to better comprehend that the gay identity is a distinct characteristic than they did forty years ago,

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[161] *See, e.g.*, ALASKA STAT. § 25.05.013(b) (2012) ("A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."); ARIZ. REV. STAT. ANN. § 25-101(C) (2007) ("Marriage between persons of the same sex is void and prohibited."); FLA. STAT. § 741.212 (2014) ("Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, . . . are not recognized for any purpose in this state."); IDAHO CODE ANN. § 32-202 (2006) ("Any unmarried male of the age of eighteen (18) years or older, and any unmarried female of the age of eighteen (18) years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage."); N.D. CENT. CODE § 14-03-01 (2009) ("Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. . . . A spouse refers only to a person of the opposite sex who is a husband or a wife."); 23 PA. CONS. STAT. § 1704 (2010) ("It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman.").

[162] *Supra* Part I.

[163] Jurisdictional Statement, *supra* note 140, at 3.

[164] Baker v. Nelson, 191 N.W. 2d 185, 186 (Minn. 1971).

[165] Transcript of Oral Argument at 12, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

and have thus decided that laws that discriminate against gays and lesbians should be evaluated on sexual orientation grounds rather than gender grounds.

Of course, if one asserts that the issue is better understood as one of gender discrimination, *Baker* can still be invalidated on other grounds. Same-sex marriage litigation would have to be informed by *Craig v. Boren*'s intermediate scrutiny standards for gender discrimination.[166] This case would serve as a sufficient doctrinal development such that *Baker* would be no longer relevant.

Baker is thus different from contemporary same-sex marriage cases on multiple levels. It revolved not around a discriminatory law but around the action of a clerk that was seen as the administration of a vague law, and it was seen as a sex discrimination case rather than a sexuality discrimination case. Because the Supreme Court draws doctrinal distinctions on both of those planes, the factual differences are significant enough to distinguish *Baker* from current cases.

Conclusion

The marriage equality movement has made great strides in the last few years. Both *Baker v. Nelson* and the summary opinion procedural rules are relics of a bygone era. *Baker* was decided before same-sex marriage was a major issue in federal jurisprudence. The extant body of summary opinions is a holdover from a time when mandatory jurisdiction rules forced the Supreme Court to address a staggering load of cases, even when it meant that those matters would not be settled stably or correctly. The Court acknowledged the need to limit such precedent, and today it should be clear that *Baker* has become irrelevant. Doctrinal developments have made *Baker* inapplicable; *Zablocki v. Redhail* ushered in a new era of robust protections for the right to marry. Differences in facts and issues have also made *Baker* irrelevant as modern cases now concern the animus inherent in laws, not the decision of one court clerk. As the gay marriage movement proceeds apace, we should stop considering *Baker* to be a hurdle and ensure that the arguments for and against same-sex marriage at the state level will be addressed on their merits.

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[166] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (delineating intermediate scrutiny by holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").